

February 16, 1999

In the Matter of: *

*

Patricia Trifero, *

Claimant *

*

v. *

*

Navy Exchange/NEXCOM, *

Employer/Self-Insurer *

*

and *

*

Crawford & Company *

Third Party - Administrator *

Case No. 1998-LHC-174

OWCP No. 1-138402

Appearances:

Stephen J. Dennis, Esquire

For the Claimant

Richard van Antwerp, Esquire

For the Employer/Self-Insurer

Before: **DAVID W. DINARDI**
Administrative Law Judge

DECISION AND ORDER AWARDING BENEFITS

This is a claim for workers' compensation benefits under the Longshore and Harbor Workers' Compensation Act as amended (33 U.S.C. § 901, **et. seq.**), herein referred to as the "Act," as extended by the provisions of the Non-Appropriated Fund Instrumentalities Act, 5 U.S.C. § 8171, **et. seq.**, 5 U.S.C. §2105. The hearing was held on January 12, 1999, in New London, Connecticut at which time all parties were given the opportunity to present evidence and oral arguments. Post-hearing briefs were not requested herein. The following references will be used: TR for the official hearing transcript, ALJ EX for an exhibit offered by this Administrative Law Judge and JX for a Joint exhibit. ALJ EX 1-8 and JX 1-12 were admitted to the record at the hearing without objection. This decision is being rendered after having given full consideration to the entire record.

Factual and Procedural History

The parties, by Stipulation of Facts and Request for Stipulated Decision and Order (JX 12), have agreed that Claimant, Patricia Trifero, suffered compensable injuries to her upper back, neck and left shoulder on August 20, 1996, while working as a supervisor in the Children's Department of the Navy Exchange in Newport, Rhode Island. (JX 11, p. 13-14). Specifically, the Claimant testified she was taking a box containing a child's car seat from a top shelf in the receiving department when she felt a great deal of pain in her shoulders and neck. (JX 11, p. 13). Her average weekly wage was \$173.06. Employer, through its insurance administrator, paid temporary total disability benefits to Claimant for the period of August 28, 1996, through September 16, 1996, and on October 7, 1996, during which time Claimant was out of work due to her injuries. (JX 1).

Claimant returned to work in a light duty capacity from October 8, 1996, through April 7, 1997, at which time she suffered no loss of earning capacity or income. She became unable to work after April 7, 1997, due to continuing symptoms associated with her August 20, 1996 injury. Employer, through its insurance administrator, paid temporary total disability benefits from April 8, 1997, through May 4, 1997.

From May 5, 1997, through July 24, 1997, Claimant returned to work with Employer in a light duty capacity, at which time she was earning less than her pre-injury average weekly wage. Employer paid temporary partial disability for this period based upon the difference between Claimant's average weekly wage and her actual earnings. On July 25, 1997, Claimant returned to her regular job, working her regular hours, and earning her regular wages. She has not suffered any further loss of earnings since that time. A Notice of Final Payment or Suspension of Compensation Payments was issued on December 28, 1998. (JX 1).

The parties have stipulated that Employer has paid all outstanding bills for medical care, chiropractic treatment and physical therapy. Employer has reimbursed Claimant for all out of pocket expenses for the purchase of prescription medications, as well as travel expenses associated with such treatment, in the amount of \$665.00. Finally, Employer has paid a fee of \$5,000.00 to Stephen J. Dennis, Esquire, counsel for Claimant, for services rendered to her before the Office of Workers' Compensation Programs and the Office of Administrative Law Judges.

The parties have filed a Request for Stipulated Decision and Order, requesting this Court accept the facts presented in the Joint Stipulation of Facts and memorialize the compensation payments made by Employer to Claimant and the fee payment made to Claimant's attorney.

The Joint Request for Stipulated Decision and Order is **GRANTED** based upon my review of this closed record and I hereby issue the following **DECISION AND ORDER**:

Nature and Extent of Disability

It is axiomatic that disability under the Act is an economic concept based upon a medical foundation. **Quick v. Martin**, 397 F.2d 644 (D.C. Cir. 1968); **Owens v. Traynor**, 274 F. Supp. 770 (D.Md. 1967), **aff'd**, 396 F.2d 783 (4th Cir. 1968), **cert. denied**, 393 U.S. 962 (1968). Thus, the extent of disability cannot be measured by physical or medical condition alone. **Nardella v. Campbell Machine, Inc.**, 525 F.2d 46 (9th Cir. 1975). Consideration must be given to claimant's age, education, industrial history and the availability of work he or she can perform after the injury. **American Mutual Insurance Company of Boston v. Jones**, 426 F.2d 1263 (D.C. Cir. 1970). Even a relatively minor injury may lead to a finding of total disability if it prevents the employee from engaging in the only type of gainful employment for which he or she is qualified. (**Id.** at 1266)

Claimant has the burden of proving the nature and extent of her disability without the benefit of the Section 20 presumption. **Carroll v. Hanover Bridge Marina**, 17 BRBS 176 (1985); **Hunigman v. Sun Shipbuilding & Dry Dock Co.**, 8 BRBS 141 (1978). However, once claimant has established that he or she is unable to return to his or her former employment because of a work-related injury or occupational disease, the burden shifts to the employer to demonstrate the availability of suitable alternative employment or realistic job opportunities which claimant is capable of performing and which he or she could secure if he or she diligently tried. **New Orleans (Gulfwide) Stevedores v. Turner**, 661 F.2d 1031 (5th Cir. 1981); **Air America v. Director**, 597 F.2d 773 (1st Cir. 1979); **American Stevedores, Inc. v. Salzano**, 538 F.2d 933 (2d Cir. 1976); **Preziosi v. Controlled Industries**, 22 BRBS 468, 471 (1989); **Elliott v. C & P Telephone Co.**, 16 BRBS 89 (1984). While Claimant generally need not show that he or she has tried to obtain employment, **Shell v. Teledyne Movable Offshore, Inc.**, 14 BRBS 585 (1981), Claimant bears the burden of demonstrating his or her willingness to work, **Trans-State Dredging v. Benefits Review Board**, 731 F.2d 199 (4th Cir. 1984), once suitable alter-native employment is shown. **Wilson v. Dravo Corporation**, 22 BRBS 463, 466 (1989); **Royce v. Elrich Construction Company**, 17 BRBS 156 (1985).

On the basis of the totality of this closed record, and as stipulated by the parties, I find and conclude that Claimant could not return to work as a supervisor in the Children's Department of the Navy Exchange during the periods of time of August 28, 1996, through September 16, 1996, on October 7, 1996, and from April 8, 1997, through May 4, 1997, and thus was totally disabled during those time periods. Employer voluntarily paid to Claimant temporary total disability benefits for these periods. Claimant is entitled to a finding of temporary total disability from August 28, 1996, through September 16, 1996, on October 7, 1996, and from April 8, 1997, through May 4, 1997. **American Stevedores, Inc. v. Salzano**, 538 F.2d 933 (2d Cir. 1976). **Southern v. Farmers Export Company**, 17 BRBS 64 (1985).

A Claimant will be entitled to temporary partial disability benefits, despite sustaining a scheduled injury, if she is still receiving treatment for the condition, which has not yet reached maximum medical improvement, and if she is employed, but has sustained a loss of wage-earning capacity. **Cox v. Newport News Shipbuilding & Dry Dock Co.**, 9 BRBS 791 (1978), **aff'd mem.**

sub nom. Newport News Shipbuilding & Dry Dock Co. v. Director, OWCP, 594 F.2d 986 (4th Cir. 1979). Two separate scheduled disabilities must be compensated under the schedules in the absence of a showing of a total disability, and claimant is precluded from (1) establishing a greater loss of wage-earning capacity than the presumed by the Act or (2) receiving compensation benefits under Section 8(c)(21). Under Section 8(c)(21) of the Act, Claimant's loss of wage-earning capacity is what is being compensated.

In this proceeding, the Claimant sought, and Employer voluntarily paid, benefits for temporary partial disability from May 5, 1997, through July 24, 1997, during which time Claimant returned to work with the Navy Exchange in a light duty capacity, and earned less than her pre-injury average weekly wage. Employer paid temporary partial disability for this period based upon the difference between Claimant's average weekly wage and her actual earnings. Based on the totality of the record, and supported by the stipulations of the parties, I find and conclude that the Claimant suffered a temporary partial disability, as a result of the August 20, 1996, injury, from May 5, 1997 through July 24, 1997.

When a Claimant is doing his or her usual work adequately, regularly, full-time, and without due help, even if he or she has a physical impairment from the work injury, a Judge may find that the employee's actual wages fairly represent his or her wage-earning capacity, and he or she has suffered no loss and therefore is not disabled. 33 U.S.C. § 908(h); **Del Vacchio v. Sun Shipbuilding & Dry Dock Co.**, 16 BRBS 190, 194 (1984). The parties have stipulated, and nothing in the record disputes, that Claimant returned to her regular job at the Navy Exchange, working her regular hours, and earning her regular wages, and that she has not suffered any further loss of earnings since that time. As such, I find and conclude that Claimant no longer suffers any disability related to her August 20, 1996, injury.

Medical Expenses

An Employer found liable for the payment of compensation is, pursuant to Section 7(a) of the Act, responsible for those medical expenses reasonably and necessarily incurred as a result of a work-related injury. **Perez v. Sea-Land Services, Inc.**, 8 BRBS 130 (1978). The test is whether or not the treatment is recognized as appropriate by the medical profession for the care and treatment of the injury. **Colburn v. General Dynamics Corp.**, 21 BRBS 219, 22 (1988); **Barbour v. Woodward & Lothrop, Inc.**, 16 BRBS 300 (1984). Entitlement to medical services is never time-barred where a disability is related to a compensable injury. **Addison v. Ryan-Walsh Stevedoring Company**, 22 BRBS 32, 36 (1989); **Mayfield v. Atlantic & Gulf Stevedores**, 16 BRBS 228 (1984); **Dean v. Marine Terminals Corp.**, 7 BRBS 234 (1977). Furthermore, an employee's right to select his own physician, pursuant to Section 7(b), is well settled. **Bulone v. Universal Terminal and Stevedore Corp.**, 8 BRBS 515 (1978). Claimant is also entitled to reimbursement for reasonable travel expenses in seeking medical care and treatment for his work-related injury. **Tough v. General Dynamics Corporation**, 22 BRBS 356 (1989); **Gilliam v. The Western Union Telegraph Co.**, 8 BRBS 278 (1978).

The parties stipulate, and the record supports, that Employer has met its liability under Section 7(a) by paying for all reasonable and necessary medical and chiropractic treatment related to the Claimant's injury, as described in JX 2-11. Furthermore, Employer has reimbursed the Claimant for all prescription medications, as well as for travel to her physicians and chiropractor for the purposes of obtaining appropriate medical and chiropractic care.

Attorney's Fee

Claimant's attorney, Stephen J. Dennis, Esq., having successfully prosecuted this matter, is entitled to a fee assessed against the Employer/Carrier.

The Joint Stipulation of Facts states that Employer, through its insurance administrator has paid a fee of \$5,000.00 to Claimant's attorney for services rendered to Claimant before both the Office of Workers' Compensation Programs and the Office of Administrative Law Judges. The parties agree that the fee is reasonable and that no further fee will be paid for any additional services undertaken in connection with the presentation of the January 12, 1999, Stipulation of Facts and Request for Stipulated Decision and Order.

In light of the nature and extent of the excellent legal services rendered to Claimant by her attorney, the amount of compensation obtained for Claimant, and Employer's agreement with the reasonableness of the fee, I find a legal fee of \$5,000.00 is reasonable and in accordance with the criteria provided in the Act and regulations, 20 C.F.R. § 702.132, and is hereby approved.

ORDER

Based on the foregoing Findings of Fact, Conclusions of Law and upon the entire record, I issue the following compensation order.

IT IS ORDERED that:

1. Claimant suffered periods of temporary total disability from August 28, 1996, through September 16, 1996, on October 7, 1996, and from April 8, 1997, through May 4, 1997;
2. Claimant suffered a period of temporary partial disability from May 5, 1997, through July 24, 1997;
3. Employer has made payment of compensation for the periods of disability stated herein and no further compensation is due at this time;

4. The medical and chiropractic treatment described in JX 2-11 was at all times reasonable and necessary and Employer, through its insurance administrator, has paid for all such medical and chiropractic treatment;
5. Claimant is no longer entitled to any additional compensation at this time due to the August 20, 1996, injury to her upper back, neck and left shoulder;
6. Claimant is entitled to reimbursement for prescription medications, as well as for travel to her physicians and chiropractor for the purposes of obtaining appropriate medical and chiropractic care; Employer, through its insurance administrator, has made the appropriate reimbursement in the amount of \$665.00;
7. A reasonable attorney's fee of \$5,000.00 is approved and the same is awarded to Claimant's attorney, Stephen J. Dennis, Esq., for representing Claimant before the Office of Workers' Compensation Programs and the Office of Administrative Law Judges; Employer, through its insurance administrator, has already paid this amount to Attorney Dennis.

DAVID W. DINARDI
Administrative Law Judge

Dated:
Boston, Massachusetts
DWD:km